IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC92072

AMERICAN EAGLE WASTE INDUSTRIES, LLC, *et al.*,

Respondents/Cross-Appellants

v.

ST. LOUIS COUNTY, MISSOURI,

Appellant/Cross-Respondent

REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI
The Honorable Barbara Wallace, Division 13, Presiding

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REPLY ARGUMENT

I. THE TRIAL COURT ERRED IN LIMITING HAULERS' AWARD TO FIVE PERCENT ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE THERE WAS NO EVIDENCE OF HAULERS' PROFIT MARGIN IN THAT THE TRIAL COURT SPECIFICALLY PROHIBITED DISCOVERY ON AND THE ADMISSION OF EVIDENCE CONCERNING HAULERS' PROFITS.

The trial court's judgment of September 2, 2011 (the "Judgment") in which it determined that St. Louis County, Missouri (the "County") was liable to Respondents/Cross-Appellants American Eagle Waste Industries, LLC, Meridian Waste Services, LLC, and Waste Management of Missouri, Inc. (collectively "Haulers") in the cumulative amount of $1,159,903.90 for violation of Mo. Rev. Stat. § 260.247 ("§ 260.247") was unsupported by any evidence and must be vacated. Although the County disagrees with Haulers' measure of monetary relief pursuant to § 260.247, even the County agrees that the trial court's judgment is without factual support and should be vacated. Reply Brief and Response to Cross-Appeal of Appellant/Cross-Respondent St. Louis County, Missouri (the "County Reply Brief"), p. 57.

The trial court's judgment must be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). In this case, the trial court's judgment erroneously and arbitrarily declared that as a matter of law 5% of gross

revenue (allegedly loss profits) is the relief due Haulers pursuant to § 260.247. Not only is that declaration legally unsupportable based on the plain provisions of § 260.247 (S*ee*, Section II, below), even were profits the standard of relief, there was no evidence much less legally sufficient proof that 5% of gross revenue was the proper calculation of Haulers' lost profits.

The fact remains that there was no evidence in the record or adduced at trial related to Haulers' profits. The reason for that is simple. The trial court had long determined in its January 25, 2011 Order that Haulers' profits were irrelevant and that gross revenue for the relevant two (2) year period was the measure pursuant to § 260.247. *See* Legal File ("L.F."), p. 123. The parties were precluded from conducting discovery regarding Haulers' profits. *See, e.g.*, L.F., p. 129 ("requesting information regarding expenses or net profit is not reasonably calculated to lead to the discovery of admissible evidence of [Haulers'] damages"); Supplemental Legal File ("S.L.F."), p. 216 (limiting the "document requests contained in [the County's] deposition notices to those issues of damages as previously rule on by the Court"). Furthermore, the trial court overruled the County's offer of proof regarding Haulers' damages at trial. Trial Transcript ("T.T."), pp. 109-10. Due to the court's previous orders and rulings, the only evidence presented at trial was evidence of Haulers' lost gross revenue cumulatively $23 million dollars. T.T., pp. 15, 38, 46, 58; Exhibits 3-5. The revenue evidence presented by Haulers was uncontroverted. As acknowledged by the trial court, it was only after Haulers relied on the trial court's previous orders and after the trial of this matter did the trial court declare the 5% of revenue measure.

Because there is no support for the trial court's judgment against the County and in Haulers' favor in the amount of $1,159,903.90, the judgment must be vacated. As further outlined below, based upon a proper interpretation of § 260.247 and the uncontroverted, admissible and credible evidence presented at trial by Haulers, this Court should enter judgment for the amount of lost revenue proven by Haulers, plus prejudgment and post-judgment interest.

II. THE TRIAL COURT ERRED IN DECLARING THAT THE PROPER MEASURE OF DAMAGES UNDER § 260.247 TO BE PROFITS BECAUSE THE STATUTE MANDATES HAULERS' DAMAGES TO BE REVENUES IN THAT § 260.247 STATES HAULERS ARE ENTITLED TO RECEIVE WHAT THEY WOULD HAVE RECEIVED FOR A PERIOD OF TWO YEARS FOR PROVIDING THE SAME SERVICE.

In its Judgment, the trial court improperly ignored the plain language of § 260.247 by awarding an unsupported estimation of profits as opposed to the revenues proven at trial.[1] Because § 260.247 mandates Haulers be awarded revenues for the relevant two (2) year period, Haulers' request that this Court vacate the Judgment entered by the trial court and enter judgment for the amount of revenues proven at trial plus prejudgment and post-judgment interest.

The trial court held a hearing and requested briefing on the issue of the measure of Haulers' damages in this case before rendering a decision. *See* L.F., p. 123. In the trial court's own words, she was "fully advised" before entering her Order/Judgment on January 25, 2011 declaring the measure of damages to be revenues. *Id.* For the next six months, the trial court consistently upheld her prior decision regarding the measure of damages. *See, e.g.*, L.F. 128-29, S.L.F., p. 216, and T.T., pp. 109-10. Only after the parties conducted discovery and presented their cases at trial under the trial court's own

[1] As Haulers explained in I., *supra*, there was no evidence in the record concerning Haulers' profits.

guidelines did the trial court reverse her prior decision and declare Haulers' damages to be a hypothetical five percent (5%) margin of profit. *See* L.F., p. 159. The trial court's actions were in error.

The County asserts that Haulers' argument that revenue is the proper measure of damages is "premised upon their misconstruction of Section 260.247." County Reply Brief, p. 58. In actuality, Haulers' argument and the trial court's initial interpretation of § 260.247 is based upon a plain reading of all of the provisions of § 260.247. Section 260.247.2 prohibits a political subdivision, such as the County, from entering into contracts with new waste collectors in an area currently serviced by private entities, such as unincorporated St. Louis County, for a period of two years from the date notice is given to the existing haulers by certified mail. Mo. Rev. Stat. § 260.247.2. The political subdivision may avoid this two-year waiting period if it contracts with the existing haulers for the two-year period. *Id.* If the political subdivision chooses to contract with the existing haulers to be displaced, the amount paid by the political subdivision must be "at least equal to the amount the private . . . entities would have received for providing such services during that period." Mo. Rev. Stat. § 260.247.3. Haulers are not misconstruing the provisions of § 260.247; the County was required to wait two years to assume control of waste collection in unincorporated St. Louis County or continue to pay existing providers, including Haulers, for the two-year period after notice what they would have been paid by customers had they continued to provide the service. The County did neither.

In fact, it is the County who misconstrues the provisions of § 260.247. Under the County's interpretation, § 260.247.3 should be read separately and independently from the other provisions of § 260.247. Under the County's warped interpretation, § 260.247 mandates that any *existing* hauler with whom the County contracted upon its takeover of collection, would be entitled to receive what it "would otherwise have received" for providing the service during the two-year timeframe. *See* County Reply Brief, p. 58. This new argument not only ignores the plain reading of § 260.247's provisions, it is disingenuous as contradicts the actions taken by the County. If the County's interpretation were correct, the entities who were already providing service in unincorporated St. Louis County and who were later awarded contracts as a result of the bidding process would be required to receive their current rates regardless of what they bid. If this interpretation of the statute were proper, there would have been no need to have a bidding process based on price as was done by the County, as the contract amounts for existing haulers would already be set. The County's post hoc rationalization flies in the face of logic and contradicts its actions in this case.

The plain and ordinary meaning of the provisions of § 260.247 entitles Haulers to the revenues they "would have received" for providing the contract services during the applicable timeframe. Haulers didn't receive "profits" from their customers prior to the County's takeover, they received revenue. The text of § 260.247 does not contain the terms "profit" or "expenses," nor does it contain any language giving the County the option of ignoring the mandates contained therein. The Court must give effect to the legislative intent as reflected in the plain language of the statute. *Gash v. Lafayette*

County, 245 S.W.3d 229, 232 (Mo. banc 2008). What the County has not disputed, and cannot dispute, is that it was completely within the Legislature's sole purview to regulate the trash hauling market by enacting the policy that the measure of compensation for a local government entity to permanently take the customers of an incumbent trash hauler is two years of gross revenue.

The County cites to several cases for the proposition that damage awards should compensate the damaged party for the losses it sustained rather than awarding a "windfall" judgment. *See* County Reply Brief, p. 59. The County also argues that recovery of profits is the proper measure of damages in this instance, should the Court not reverse judgment based upon one of the reasons set forth in the County's Points on Appeal, as damages for a breach of contract should put the damaged party in the same position as it would have been in had the contract been performed.[2] *See id.*, pp. 59-60. There is absolutely no support in the actual provisions of § 260.247 for this assertion.

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[2] The County has not appealed the legal declaration of the measure of damages to be applied in this case. Rather, all of the County's allegations of error in its Points on Appeal are directed to Haulers' alleged failure to state a claim, failure to present evidence, or waiver of their right to challenge the program at issue. *See* Brief of Appellant/Cross-Respondent St. Louis County, Missouri ("County Initial Brief") and County Reply Brief. Essentially, the County's ONLY claim is that Haulers are not entitled to any monetary award. The County has assumed an "all or nothing" stance and has waived any ability to complain as to the measure of damages allowable under § 260.247.

Haulers' claim is a statutory claim pursuant to § 260.247, not a tort claim or common law breach of contract claim, so that the cases cited by the County are inapplicable.

The County raises new issues before this Court as justification for the trial court's decision to award damages based upon a hypothetical calculation of profits.[3] The County claims that judgment based upon an award of revenues, rather than profits, would violate Article VI, Section 25 of the Missouri Constitution, "which prohibits counties from granting public money to private persons or corporations." County Reply Brief, pp. 61-62. The County does not challenge the constitutionality of an award of profits under this provision, however. It is hypocritical to claim an award of revenues would run afoul of this constitutional provision whereas an award of profits would not.

Regardless, as the trial court properly found:

> An expenditure from the public treasury is for a public purpose if it is for the support of the government or for some of the recognized objects of government, or directly to promote the welfare of the community. The fact that special benefits may accrue to some private persons does not

[3] Although the County raised these issues as affirmative defenses before the trial court, the trial court rejected these affirmative defenses and entered judgment in favor of Haulers. The County did not appeal the trial court's rejection of these arguments and now improperly raises them in response to Haulers' cross-appeal. Not only are these points waived, as further outlined below, they are substantively without merit.

> deprive the government action of its public character, such benefit being incidental to the primary public purpose.

Legal File ("L.F."), pp. 120-21 (citing *Brawley v. McNary*, 811 S.W.2d 362, 367 (Mo. banc 1991)). *Id.* at 121. If the County's interpretation of this provision were correct, any judgment against the County for illegal behavior would violate this constitutional provision. It is non-sense. Moreover, if the County took Haulers' 40,000 customers and gave them to other private haulers without any public purpose, that would equate to the use of public resources for private gain and violate Article VI, Section 25. The expenditure of funds to remedy the County's blatantly illegal conduct does not run afoul of the Missouri Constitution.

The County also makes passing reference to the fact that Haulers should not be awarded revenues because "they retained the use of their equipment and labor and were therefore able to generate elsewhere some or all of the revenues they now seek to obtain from the County." County Reply Brief, p. 61. Before the trial court, the County raised mitigation as an affirmative defense. L.F., p. 141 at ¶ 12. The trial court properly found that mitigation was inapplicable in this case because Haulers' damages were finite and not ongoing. L.F., p. 126. Furthermore, the County's enforcement of the exclusivity provisions of the created districts made it impossible for Haulers to regain any of the lost customers and therefore mitigate the enormous harm caused by the County's illegal and

permanent taking of Haulers' 40,000 customers. L.F., pp. 126-27. The County's mitigation defense still fails.[4]

The proper monetary award under § 260.247 is the revenues Haulers would have recovered for the time period proscribed by the trial court. The portion of the trial court's Judgment declaring profits to be the proper measure of damages should be vacated and this Court should enter judgment based upon the lost revenues as proven by Haulers at trial.

III. THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT IN HAULERS' FAVOR IN THE TOTAL AMOUNT OF $23,198,078.00 BECAUSE THE TRIAL COURT'S JUDGMENT THAT HAULERS WERE ENTITLED TO JUDGMENT IN THE AMOUNT OF $1,159,903.90 WAS CONTRARY TO LAW AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THERE WAS COMPETENT, SUBSTANTIAL AND UNCONTROVERTED EVIDENCE TO SUPPORT A JUDGMENT FOR HAULERS IN THE AMOUNT OF $23,198,078.00.

The uncontroverted evidence elicited at trial shows that Haulers are entitled to judgment in the cumulative amount of $23,198,078.00. The trial court's judgment based upon a hypothetical profit margin is without merit or support and should be vacated and judgment should be entered for Haulers in the cumulative amount of $23,198,078.00.

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[4] Likewise, the County's passing reference to Mo. Rev. Stat. § 537.610.3 is without merit or support.

Haulers' expert, C. Eric Ficken ("Mr. Ficken"), testified that Haulers were each damaged as a result of the County's willful violation of § 260.247 in the following amounts: American Eagle in the amount of $5,221,733.00, Meridian in the amount of $1,984,484.00, and Waste Management in the amount of $15,991,861.00. Trial Transcript ("T.T."), pp. 15, 38, 46, 58; Exhibits 3-5. The County offered no evidence to controvert these amounts or to advance alternative damage theories. *See* T.T., pp. 119-46. Despite a thorough cross-examination by the County (T.T., pp. 68-112), the trial court found Mr. Ficken's testimony to be credible. L.F., p. 158.

The County points out that Mr. Ficken had not previously used gross revenues as a measure of business losses. County Reply Brief, pp. 60-61. The County fails to highlight the reasoning for this, as elicited on redirect:

Q. (by Ms. Hall) Mr. Ficken, have you ever provided testimony in a case where the measure of damages is predetermined by the judge?

A. (by Mr. Ficken) I'm not sure I understand that.

Q. In this case there was some testimony or some questions asking you about why you selected your particular methodology, why you didn't include things, how this would compare to what you would typically do. Is this a typical case?

A. No, it's not a typical case. This is clear instruction, just specifically said the time period, how it's to be calculated, how long, and what the stream of revenue.

T.T., pp. 117-18. Earlier in his testimony, Mr. Ficken testified that the lost revenues measure was derived directly from the trial court's Order of January 25, 2011. T.T., pp. 16-19. Hauler's expert calculated Haulers' damages based upon the trial court's then correct interpretation of § 260.247. In Mr. Ficken's own words, this is not a "typical case." The fact that Mr. Ficken had not previously used a lost revenue measure to calculate business losses is irrelevant in light of the statute's terms.

The uncontroverted record of evidence shows that American Eagle is entitled to damages in the amount of $5,221,733.00, that Meridian is entitled to damages in the amount of $1,984,484.00, and that Waste Management is entitled to damages in the amount of $15,991,861.00. Because credible and uncontroverted evidence is before this Court, Haulers request this Court enter judgment in their favor as follows: American Eagle be awarded $5,221,733.00, Meridian be awarded $1,984,484.00 and Waste Management be awarded $15,991,861.00, plus pre and post-judgment interest and attorneys' fees for County's antitrust violation.

IV. THE TRIAL COURT ERRED IS DISMISSING COUNT III OF HAULERS' FIRST AMENDED PETITION BECAUSE HAULERS PROPERLY PLED A VALID CAUSE OF ACTION UNDER MISSOURI ANTITRUST LAWS IN THAT ST. LOUIS COUNTY CREATED MONOPOLY TRASH DISTRICTS IN UNINCORPORATED ST. LOUIS COUNTY IN VIOLATION OF THE LAW.

Haulers properly pled a cause of action against the County for violation of the Missouri antitrust statutes in their First Amended Petition, and the trial court's dismissal of that claim was in error.

The state action exemption to antitrust liability does not apply to every governmental activity by virtue of an entity's status as a political subdivision of the state. *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 520 (8th Cir. 1985). "Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were *authorized* by the State pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* (emphasis added). The rule in the Eighth Circuit, therefore, is: "(1) the state legislature must have authorized the challenged municipal activity, and (2) the legislature must have intended to displace competition." *Massengale v. City of Jefferson, Missouri*, 2011 U.S. Dist. LEXIS 84940, No. 10-CV-4232-NKL, at *20 (W.D. Mo. August 2, 2011) (citing *L & H Sanitation*, 769 F.2d at 521).

The County argues that regulation of waste collection is authorized by state statute and "[b]y virtue of Section 260.215 Mo. Rev. Stat., County has clear authority to regulate

waste collection and to suppress competition in that field." County Reply Brief, p. 67. Haulers agree that typically under this statute, "municipalities are granted broad authority to regulate solid waste management and to contract with private companies to provide for solid waste management and disposal." *Massengale,* 2011 U.S. Dist. LEXIS 84940 at * 25. What the County ignores, however, is that all County actions, including market regulation activities, are not exempt – the County's action must comply with state policy to displace competition in the marketplace. *See L & H Sanitation*, 769 F.2d at 520; *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336 (Mo. Ct. App. E.D. 2008); *Christian Disposal, Inc. v. Village of Eolia*, 895 S.W. 2d 632 (Mo. Ct. App. 1995).

With the exception of *Fischer*, all the cases cited by the County in support of its arguments against antitrust liability involve situations where the plaintiffs challenged the local entities' displacement of competition in a local market as such. Haulers concede that § 260.215 authorizes the County's takeover of waste collection in unincorporated St. Louis County. However, to be authorized to displace current providers, including Haulers, from the market, the County was obligated to follow the procedures for doing so established by the Legislature and codified in statute. Haulers challenge the County's takeover of collection *in violation of § 260.247* by failing to either wait two years after giving proper notice or contracting with Haulers for the two-year period. The Legislature has authorized the County's creation of a monopoly with respect to waste collection in unincorporated St. Louis County, but only if done is a *specific* and *measured* manner.

By passing § 260.247, the Legislature expressed its clear intent regarding how such monopolies were to be implemented. The fundamental purpose of § 260.247 is to "provide an entity engaged in waste collecting with sufficient notice to make necessary business adjustments prior to having its services terminated in a given area." *Christian Disposal*, 895 S.W. 2d at 634. The County's violation of the notice and waiting period requirements of § 260.247 amount to "[an] attempt to change the policy of the state as declared for the people at large." *American Eagle Waste Industries*, 272 S.W.3d at 343. The County's actions violate state policy and are specifically *not authorized* by the Legislature. Therefore, the County is not protected from antitrust liability under the state action exemption in this instance and Haulers' antitrust claims were improperly dismissed. Accordingly, this claim should be remanded to the trial court for further proceedings as to liability, damages not already recovered and attorneys' fees pursuant to Mo. Rev. Stat. § 416.121.

V. THE TRIAL COURT ERRED IN FAILING TO AWARD HAULERS PREJUDGMENT INTEREST ON THEIR DAMAGES BECAUSE HAULERS ARE ENTITLED TO PREJUDGMENT INTEREST UNDER MO. REV. STAT. § 408.020 IN THAT HAULERS' DAMAGES WERE READILY ASCERTAINABLE AT THE TIME DEMAND WAS MADE.

Haulers properly made a demand for prejudgment interest in their First Amended Petition. The measure of damages due Haulers for the County's willful violation of § 260.247 is set forth in the statute. *See* Section II, *supra*. At the time Haulers filed their First Amended Petition, the monies owed to Haulers were due and reasonably ascertainable revenues lost for the relevant two-year notice period. Therefore, Haulers have met the conditions for an award of prejudgment interest and the trial court's denial of same should be reversed. *See Jablonski v. Barton Mutual Ins. Co.*, 291 S.W.3d 345, 350 (Mo. Ct. App. W.D. 2009) (stating the three conditions for an award of prejudgment interest are: "(1) the expenses must be due; (2) the claim must be liquidated or the amount of the claim reasonably ascertainable; and (3) the obligee must make a demand on the obligor for the amount due.").

The County argues that Haulers' claim for damages pursuant to § 260.247 is either an implied-in-law contract or a tort claim and, therefore, Haulers are not entitled to recover prejudgment interest. As stated before, Haulers bring their claim for damages pursuant to § 260.247; Haulers raise a statutory claim, not a common law claim as suggested by the County. Furthermore, the County offers no citations in support of its conclusory statements against Haulers' claims and its arguments to uphold the trial court's

denial of prejudgment interest in favor of Haulers should be disregarded. Pursuant to the testimony at trial, Haulers are entitled to prejudgment interest in an amount equal to at least the $4 million proven at trial. T.T., p. 59.

CONCLUSION

The County has failed to offer any authority, either legal or factual, to refute the arguments made by Haulers in their Points on Appeal. The Judgment entered by the trial court is unsupported by evidence and misstates the law with respect to Haulers' damages for the County's violation of § 260.247. The trial court also improperly dismissed Count III of Haulers' First Amended Petition seeking damages for the County's violation of the state antitrust statutes. Therefore, Haulers respectfully request:

1) the trial court's judgment of September 2, 2011 be vacated;
2) final judgment be entered for Haulers on Count II of their First Amended Petition in the following amounts representing lost revenue:
    a. for American Eagle Waste Industries, LLC in the amount of $5,221,733.00, plus prejudgment interest at a rate of nine percent (9%) from April 27, 2009 and post-judgment interest;
    b. for Meridian Waste Services, LLC in the amount of $1,984,484.00, plus prejudgment interest at a rate of nine percent (9%) from April 27, 2009 and post-judgment interest;
    c. for Waste Management of Missouri, Inc. in the amount of $15,991,861.00, plus prejudgment interest at a rate of nine percent (9%) from April 27, 2009 and post-judgment interest; and
3) the trial court's dismissal of Count III of Haulers' First Amended Petition be reversed and Count III be remanded to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Reply Brief of Respondents/Cross-Appellants is 4,556, exclusive of the cover, signature block, and certificate of compliance and service.

The undersigned also certifies that on this 10th day of April, 2012, a copy of the foregoing was served via the Court's e-filing system and electronic mail on:

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